Supreme Court, U.S.
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No. 01-1100

IN THE

Supreme Court of the United States

EASTERN MINERALS INTERNATIONAL, INC., ET AL.,
Petitioners,

v.

THE UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY TO BRIEF IN OPPOSITION

WALTER H. FLEISCHER
1320 Old Chain Bridge Rd.
Suite 440
McLean, Virginia 22101
(703) 821-0613

MICHAEL BOOS
4101 Chain Bridge Rd.
Suite 313
Fairfax, Virginia 22030
(703) 691-7717

RAYMOND D. BATTOCCHI
Counsel of Record
JOHN R. POWELL
VICKI A. PAISLEY
Gabeler, Battocchi & Griggs, PLLC
1320 Old Chain Bridge Rd.
Suite 260
McLean, Virginia 22101
(703) 847-8888
Counsel for Petitioners

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Each of the four questions stated in the petition (Pet. (i)) is properly presented for review.

Question 1. The Court of Appeals' first ruling (Pet. App. 9a-11a) was that, although Eastern Minerals International, Inc. ("Eastern") proved that seeking a permit became futile before its right to renew its lease expired on August 31, 1990, Eastern could not recover for a permanent taking because it voluntarily permitted its lease to end on February 28, 1991. Respondent argues (Br. Opp. 14-15) that the Federal Circuit's primary ruling was unnecessary to its decision. That unusual argument does expose the untenable nature of the result reached by the Federal Circuit. However, respondent is incorrect. This ruling was essential to the judgment below.

The Trial Court made findings that Eastern's permit application became futile in early August 1990, before the right to renew expired (Pet. App. 34a-38a). Applying the rulings in decisions of this court to these findings, a permanent taking of Eastern's leasehold interest (including the right to renew) occurred, and Eastern's claim for that taking ripened, in early August 1990. The Court of Appeals did not reverse these findings. Indeed, it acknowledged them by noting (Pet. App. 8a) that OSM had determined that mining anywhere on the land of Cane Tennessee, Inc. ("Cane"), the lessor, would "adversely affect" the Park.

The Court of Appeals nevertheless ruled as a matter of law (Pet. App. 10a) that Eastern could not recover for a permanent taking, despite proving that seeking a permit had become futile before the right to renew the lease expired. Absent that ruling, the United States would have been liable for a permanent taking, as the Trial Court had held, and it would have been unnecessary for the Federal Circuit to go on to address the question of extraordinary delay. Thus, contrary to the government's view (Br. Opp. 14-15), the Federal Circuit's primary ruling was essential to the disposition of the case, and it goes to liability, not measure of damages.[1]

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[1] The Federal Circuit's property interest and futility ruling was wrong on the facts as well as the law, because Eastern remained in possession as a holdover tenant, with Cane's consent, until 1993 (JA 84 (Tr. 496-98)).

Question 2. Whether Wilson W. Wyatt, Sr. and Anne D. Wyatt ("Wyatts"), or the Wyatt children, can recover for a permanent taking is properly presented for the reasons just stated.

Further, this case presents the question whether the Wyatts or their children can recover based on OSM's 1994 permit denial. The United States acknowledges (Br. Opp. 12-13) that OSM's 1994 written permit denial was a final agency action precluding mining on the property. Contrary to the government's argument (Br. Opp. 13, 15 n. 7), however, the claims of the Wyatts or their children are not "wholly derivative" of Eastern's. The Court of Appeals made no such ruling, and for good reason. The 3.5% royalty is not tied to Eastern's lease in any way. *See* Pet. App. 17a. The royalty is payable when any person mines and removes coal from the property.[2] Once OSM determined that no mining could take place on the property – – which even on the Government's theory occurred upon the 1994 final decision – – the Wyatts or their children had a ripe takings claim, *Palazzolo v. Rhode Island,* 533 U.S. 606, 619-621 (2001) (no need to pursue permit if allowable uses of property are known), and they were entitled to compensation for the fair market value of their royalty interest at the time of the taking.

Question 3. The Trial Court found, *inter alia,* that OSM never would have granted a permit, and adopted the policy of stopping Eastern's development without taking a final action Eastern could appeal, while waging a war of attrition against Eastern (Pet. App., 34a, 36a). Petitioners argued (Pet. 15-17) that

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[2] The 3.5% royalty was reserved in a February 15, 1979 deed in which the Wyatts conveyed their property to Cane. The deed states that the Wyatts "reserve unto themselves . . . a royalty interest in the coal in, on, and underlying the property conveyed equal to three and one-half (3-1/2%) per cent of the gross sales price of all coal mined and removed from the foregoing property by whatever mining or removal method." D. Ex. 68, p. 6, received in evidence, Tr. 1142. That royalty was thus payable whether Cane, Eastern, or any other person mined and removed the coal.

the Federal Circuit circumvented several decisions of this Court[3] by completely disregarding the Trial Court's findings of repetitive and unfair procedures, while reversing its judgment which was based in part on those findings. Respondent seems to argue (Br. Opp. 11) that the Federal Circuit did address the Trial Court's findings on this issue, and that it ruled that the procedures OSM used were reasonable in the circumstances. The Federal Circuit's opinion does not support such an argument. However, whether the Federal Circuit disregarded this court's repetitive and unfair procedures standard, or instead undercut it by impliedly reversing the Trial Court's unfairness findings, this case presents the question whether petitioners can recover because the agency used unfair and protracted procedures to avoid a final decision, including failing to issue in writing a decision it reached to deny a permit.

Question 4. In the Court of Appeals' view (Pet. App. 11a, n. 6), it was appropriate to rule on the issue of extraordinary delay because, although Eastern could not recover for a permanent taking, it might recover for a temporary taking of its leasehold interest existing from the end of August 1990 through February 1991. The Federal Circuit stated that: in conducting this review, it "examines findings of fact for clear error and reviews legal conclusions completely and independently. . . . Whether or not a taking has occurred is a question of law based on factual underpinnings." (Pet. App. 9a).

Contrary to the government's view (Br. Opp. 10), petitioners do dispute that articulation of the proper standard of review. That articulated standard is based on Federal Circuit decisions, not decisions of this Court. The Federal Circuit's application of that standard of review to support its ruling that the Trial Court's findings of extraordinary delay were clearly erroneous is plainly at odds with decisions of this Court addressing the deference to be given trial court findings in a

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[3] *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 350, n. 7 (1986); *Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 698 (1999); and *Palazzolo, supra,* 533 U.S. at 621.

takings case.[4] Thus the question as to what standard of review properly applies in takings cases is presented here.

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The government does not dispute that the takings involved here were categorical, and that Eastern detrimentally relied upon two validly issued permits. The Federal Circuit reversed the judgments for Eastern and the Wyatts despite these considerations, and the Trial Court's extensive findings of futility and intentional delay.

Certiorari should be granted.

Respectfully submitted,

WALTER H. FLEISCHER
1320 Old Chain Bridge Rd.
Suite 440
McLean, Virginia 22101
(703) 821-0613

MICHAEL BOOS
4101 Chain Bridge Rd.
Suite 313
Fairfax, Virginia 22030
(703) 691-7717

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RAYMOND D. BATTOCCHI
Counsel of Record

JOHN R. POWELL
VICKI A. PAISLEY
Gabeler, Battocchi & Griggs, PLLC
1320 Old Chain Bridge Rd.
Suite 260
McLean, Virginia 22101
(703) 847-8888

Counsel for Petitioners

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[4] *Monterey, supra,* 526 U.S. at 720, citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992), quoting *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978).